Supreme Court, U.S.
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No. 96-495

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN DOE, *et al.*,
Petitioners,

v.

GEORGE LOCKWOOD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

WHETHER AN INDIVIDUAL HAS A CONSTITUTIONALLY PROTECTED PRIVACY INTEREST IN PREVENTING THE PUBLIC DISCLOSURE OF INFORMATION REGARDING HIS HIV INFECTION WHEN SUCH INFORMATION PREVIOUSLY HAS BEEN DISCLOSED IN OPEN COURT PROCEEDINGS AND PUBLIC COURT RECORDS.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is unpublished. The memorandum opinion and order of the district court (Pet. App. 16a-34a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1996. This Court's jurisdiction is invoked by Petitioners John and Jane Doe pursuant to 28 U.S.C. § 1245(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners John and Jane Doe claim Respondents violated their rights under Amendment XIV, Section 1,

United States Constitution, and seek monetary damages pursuant to 42 U.S.C. § 1983. This constitutional provision and statute are set out verbatim at pages 1 and 2 of the Petition.

STATEMENT OF THE CASE

On March 18, 1994, petitioners John Doe and Jane Doe (collectively, "Petitioners") filed their Complaint in the United States District Court for the Northern District of Ohio alleging various federal and state causes of action against five individual and two corporate defendants, including respondent George Lockwood ("Lockwood"). Lockwood is the Deputy Health Commissioner for respondent Warren City Board of Health (the "Board").[1] At issue is the opinion and judgment of the United States Court of Appeals for the Sixth Circuit affirming the dismissal by the district court of Petitioners' Second Amended Complaint (the "Complaint").

Petitioners allege that, at some point in early fall of 1993, Lockwood had discussions with an employee of the Ohio Department of Health who had been involved in testing Petitioners for the human immunological virus ("HIV") associated with Acquired Immune Deficiency Syndrome ("AIDS"). In that discussion, the employee revealed to Lockwood that he had received a threat from John Doe to the effect that Doe intended "to intentionally infect unknowing female sexual partners" with HIV.

According to Petitioners, Lockwood thereafter sought to expose John Doe's identity and AIDS status. Lockwood purportedly disclosed John Doe's identity and AIDS diagnosis in the fall of 1993 to various law enforcement offi-

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[1] This brief is filed solely on behalf of Lockwood and the Board. The Board was added as a defendant in Petitioners' Second Amended Complaint. Leave to file that pleading was granted by the district court on the same date it issued its memorandum opinion and order granting Lockwood's motion to dismiss.

cials in Trumball County, Ohio, including the county's assistant prosecutor, the Niles, Ohio municipal prosecutor, and several members of the Niles police force. Petitioners allege that, in September 1993, these law enforcement officials already knew of John Doe's "AIDS diagnosis" through other means and that one, respondent Bruce Bennett, even had a copy of John Doe's AIDS test results in his files.

Petitioners further acknowledge that, by the time of Lockwood's alleged disclosures, John Doe had revealed his HIV positive status in an open proceeding in the Niles Municipal Court. Doe had been convicted on September 15, 1993, on a charge of receiving stolen property and had received a sentence of incarceration for six months. Two days later, he appeared before Judge Thomas Townley and requested that he be granted medical leave from this sentence for treatment of his HIV infection. The disclosure of his HIV positive status was journalized on the municipal court's criminal trial docket, a public record, as follows:

> Defendant appeared for review of his sentence and requested release for treatment for HIV positive. Defendant shall be transported to Dr. Crouch Family Practice Center in Warren, Ohio. . . .

Petitioners attached a copy of the trial docket to the Complaint as Exhibit A-9.

In early December 1993, Lockwood told two local newspapers that the State Health Department had alerted the Board regarding John Doe's threat to infect others and confirmed that the man who made the threat had lived in Niles and Warren, Ohio. While acknowledging that Lockwood never revealed John Doe's name to the media. Petitioners contend that he revealed "sufficient background information" regarding John Doe to disclose his identity. Yet, contrary to this conclusory allegation, the newspaper articles attached as exhibits to the Com-

plaint state that Lockwood did not divulge "even general characteristics such as race and age" which might lead others to identify John Doe.

Petitioners claim that Lockwood's alleged dissemination of information regarding John Doe, combined with disclosures by other individual respondents herein, "proximately caused the violation of [Petitioners'] rights to privacy . . . as secured by the Fourth and Fourteenth Amendments of the U.S. Constitution." Petitioners further assert that the Board pursued a *de facto* policy "to expose John Doe and his AIDS status" which "proximately caused the violation of [Petitioners'] constitutional rights to privacy . . ." and demonstrated "a deliberate indifference to the constitutional rights" of Petitioners by failing to train its agents (presumably Lockwood) regarding state statutory protections for HIV/AIDS information.

On the motions to dismiss of Lockwood and other respondents herein, the district court, in a Memorandum Opinion and Order filed January 27, 1995, held that Petitioners' "right to privacy allegations fail to state a claim upon which relief can be granted pursuant to 42 U.S.C. § 1983," finding that two federal appellate decisions, *J.P. v. DeSanti,* 653 F.2d 1080 (6th Cir. 1981), and *Doe v. Wigginton,* 21 F.3d 733 (6th Cir. 1994), were controlling and dispositive of Petitioners' constitutional privacy claims. It further ruled that, even if Petitioners were able to state an actionable substantive due process claim, the individual defendants, including Lockwood, would be entitled to qualified immunity from damage liability based on this precedent. Accordingly, it dismissed the Complaint.

That judgment was affirmed by the court of appeals based on its *de novo* review of the Complaint. Rather than rely on its prior decisions in *DeSanti* and *Wigginton,* the court assumed that the constitutional privacy right asserted by Petitioners existed, but found that the factual

allegations in the Complaint failed to state a claim for violation of that right due to the disclosure of John Doe's HIV positive status at the hearing before Judge Townley. As stated by the court:

> Under the facts as stated in the complaint, John Doe cannot claim that state actors who disseminate the same information to the public that he disclosed in open court have violated his asserted federal constitutional right to informational privacy. We believe this is true even if the state actors' source of the private information was not the court proceedings because the information is no longer "private" in the sense that the public is unaware of the information.

(Pet. App. at 12a.)

ARGUMENT

The court of appeals affirmed the dismissal of Petitioners' Complaint on narrow grounds. It held simply that the publication of John Doe's HIV positive status in open court and on the public record, acknowledged by Petitioners in their Complaint, extinguished as a matter of law any claim that such information could be deemed "private." Unable to cite to any authority which would suggest that this ruling is inconsistent with prior decisions of this Court or those of another court of appeals, Petitioners attempt to manufacture a conflict between the opinion rendered by the *district court* below and a series of decisions by other federal courts that have misinterpreted and misapplied this Court's holding in *Whalen v. Roe*, 429 U.S. 587, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). In essence, Petitioners ask the Court to issue a writ of certiorari and review the dismissal of the Complaint based not on the holding of the court of appeals in this case but decisions issued by that court in prior, unrelated cases. This bid to obtain what would be tantamount to an advisory opinion from the Court should be rejected and the petition denied.

1. ***The Decision On Appeal Below Is Consistent With Prior Decisions Of This Court And The Various Federal Courts Of Appeals.***

Petitioners do not address the finding of the court of appeals that information regarding John Doe's HIV positive status "entered the public domain at the hearing" on his request for medical leave before Municipal Judge Townley. Nor do they challenge the court's central holding that, as a result of this disclosure, Respondents "could not have breached any federal constitutional right in informational privacy Doe may [have] formerly had in this information by disseminating to the public information that was already public." (Pet. App. at 14a.) Petitioners' failure to contest these dispositive aspects of the decision below is understandable since "there is no question that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record." *Doe v. City of New York*, 15 F.3d 264, 268 (2d Cir. 1994).[2] *See also Scheetz v. The Morning Call, Inc.*,

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[2] Petitioners note correctly that, in *City of New York*, the court of appeals found that the conciliation agreement revealing the plaintiff's HIV status was not a public record as a matter of law and did not become public until the defendant chose to make it so. *City of New York*, 15 F.3d at 269. However, Petitioners' attempt to analogize these facts to John Doe's disclosure of his HIV diagnosis before Judge Townley breaks down when it is recognized that neither Judge Townley nor the Niles Municipal Court was named as a defendant in this case. Contrary to Petitioners' allegations, Judge Townley is not, as a matter of law, an employee of respondent City of Niles. In *Foster v. Walsh*, 864 F.2d 416 (6th Cir. 1988), the court of appeals held that Ohio municipal courts were not "persons" within the meaning of 42 U.S.C. § 1983 since such courts are distinct from the municipal corporations in which they sit. As stated by the court:

> It cannot be seriously argued that an Ohio municipal court is indistinguishable from the municipal corporation in which it sits. The [municipal court] . . . is part of the Ohio state court system, established by the Ohio state legislature. Ohio Rev. Code § 1901.01. It is subject to the supervision of the Ohio Supreme Court. Ohio Const., Art. IV, § 5. The municipal

946 F.2d 202, 207 (3d Cir. 1991) (individual could not have reasonable expectation of privacy with respect to information reported to police and available in public record), *cert. denied*, 502 U.S. 1095 (1992).

This Court has long adhered to the principle that "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947). Accordingly, once truthful information is publicly revealed in the courtroom and placed in the public domain, further dissemination of that information cannot be constitutionally restrained by the State. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103, 99 S.Ct. 2667, 2671, 61 L.Ed.2d 399 (1979), citing *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the Court held that damages could not be recovered against a television station based on the tort of invasion of privacy when the station had reported the name of a rape victim that had been revealed in court records, even where state law made publication of such information a crime. The Court noted that under prevailing common law no action for public disclosure of private information arises where that information is a matter of public record.

> There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record. . . .

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court may not be abolished by the city council, nor may the council expand or restrict the court's jurisdiction. See *State ex rel. Cherrington v. Hutsinpiller*, 112 Ohio St. 468, 147 N.E. 647 (1925).

864 F.2d at 418-19. Even if one were to assume that Petitioners' unsupported legal conclusions regarding the actions of Judge Townley are correct, those actions cannot be imputed to respondent City of Niles.

Cox Broadcasting, 420 U.S. at 494, 95 S.Ct. at 1045, quoting Restatement (Second) of Torts § 652D, Comment *c* (Tent. Draft No. 13, Apr. 27, 1967).[a] Whether the name of the victim should have been revealed initially in court documents was immaterial in determining whether republication of that information was actionable. "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." 420 U.S. at 495, 95 S.Ct. at 1046.

Simply put, Petitioners could no longer claim an interest in preventing the alleged disclosure of John Doe's HIV infection once that fact was spread upon the public record. Whether, as Petitioners allege, John Doe was "forced" by Judge Townley to reveal this information is irrelevant to the viability of Petitioners' privacy claims against Lockwood and the other respondents. By the time Lockwood is alleged to have disclosed publicly John Doe's HIV positive status in December 1993, that information, rightly or wrongly, had been a matter of public record for two and a half months and could not be regarded as private in any sense of the word.

At no point in their petition to this Court do Petitioners even attempt to explain how Lockwood and the Board could be held liable for disclosure of information that was already a matter of public record. Instead, they attack the court of appeals' purported failure to accept their unsupported allegation that John Doe was "forced" to reveal his HIV infection in open court by Judge Townley and find that such disclosure was not "voluntary, knowing and intelligent." (Petition at 19, 22.) This claim of error plainly does not offer a compelling basis for the Court to exercise its discretion and accept this case for review.

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[a] The quoted comment was incorporated into the final version of the Restatement at Comment b. See Restatement (Second) of Torts § 652D, Comment *b*, at 385 (1977).

Moreover, it is wrong. In their Complaint, Petitioners expressly allege that "John Doe requested medical leave from the [Municipal] Court for treatment of his blood disorder . . . ." (Pet. App. at 63a, ¶ 25.) As the court of appeals noted, there is not a single factual allegation in the Complaint suggesting "that Doe's request for medical leave was other than a voluntary choice on his part." (Pet. App. at 13a.) Having made that request, Doe could not have reasonably expected that the municipal court would not require him to disclose the nature of the medical condition for which he desired to obtain treatment, particularly when he had just been sentenced two days earlier. Knowing that he was in open court, Doe chose to divulge his HIV condition in return for relief from his sentence.

To assert that Doe was "forced" to reveal his HIV positive status under the circumstances alleged is therefore meaningless and can only be regarded as an unwarranted factual inference which the court was free to disregard in determining whether Doe's disclosure of his condition was knowing and voluntary. *See Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987) (on motion to dismiss for failure to state a claim, court must accept as true well-pleaded facts but need not accept as true legal conclusions or unwarranted factual inferences); *Blackburn v. Fisk University*, 443 F.2d 121, 123 (6th Cir. 1971) (court considering motion to dismiss is not bound by allegations that are clearly unsupported and unsupportable). Looking solely at the *facts* alleged in the Complaint, the court of appeals concluded that "Doe has not made a threshold showing that he was given no other choice by the state than to reveal" his HIV positive status. (Pet. App. at 14a.) In light of the public nature of that disclosure and its journalization on the official records of the municipal court, Doe's HIV diagnosis became a matter of public knowledge as a matter of law, thereby extinguishing any claim Petitioners might have been able to assert based on their allegations of subsequent dissemination of that information by Respondents.

2. *Decisions Issued By The Court Of Appeals In Prior, Unrelated Cases Do Not Offer A Basis For Granting The Petition.*

Petitioners devote the bulk of their petition to a discussion of two prior opinions of the Court of Appeals for the Sixth Circuit—*Jarvis v. Wellman*, 52 F.3d 125 (6th Cir. 1995), and *Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994)—and how those opinions purportedly conflict with this Court's decision in *Whalen v. Roe*, 429 U.S. 587, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). Petitioners suggest that the Court should accept *this* case for review to "correct" the "Sixth Circuit's hostility to *Whalen's* formulation of informational privacy." (Petition at 15.) The difficulty with this argument is obvious. The court of appeals did not rely on either *Wigginton* or *Jarvis* in affirming the dismissal of the Complaint.

Indeed, the court of appeals assumed without analysis that the constitutional right to informational privacy claimed by Petitioners existed *despite* the holdings in *Wigginton* and *Jarvis* to the contrary. It focused instead on whether the factual allegations in the Complaint "show that the defendants violated John Doe's right to informational privacy under the Constitution of the United States . . . ." (Pet. App. at 11a.) It found those allegations insufficient because of Doe's prior public disclosure of his medical condition. (Pet. App. at 12a.) Nothing in the court of appeals' opinion indicates that it adopted the reasoning or precedent employed by the district court. Rather, it affirmed the district court's decision because it found that, based on its *de novo* review of the Complaint, Petitioners had failed to state a federal claim upon which relief can be granted.

The opinion issued by the court of appeals in this case bears no resemblance to the decisions rendered in *Wigginton* and *Jarvis*. The holdings in those prior cases are unquestionably at odds with decisions issued by other federal appellate courts. They have absolutely nothing to

do, however, with the decision rendered by the court of appeals in *this* case. Petitioners' attempt to suggest otherwise borders on the disingenuous. Petitioners not only seek to mislead the Court as to the nature and content of the decision below, they also misstate the meaning and import of this Court's decisions in area of "informational privacy."

Specifically, this case does not, as Petitioners argue, implicate the constitutional privacy interest addressed by this Court in *Whalen*. It was the individual's right to avoid disclosure of otherwise private information *to* the government—specifically the reporting to New York state officials of the names and addresses of individuals who were prescribed certain drugs—which was at issue in that case. *Whalen*, 429 U.S. at 591, 97 S.Ct. at 872. Noting that the disclosures required under the state statute were not "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care", 429 U.S. at 602, 97 S.Ct. at 878, this Court held that the required reporting of such information did not "constitute an invasion of any right or liberty protected by the Fourteenth Amendment." 429 U.S. at 603-604, 97 S. Ct. at 878.

What was not at issue and was not decided in *Whalen* was whether the public dissemination of such information *by* New York officials would implicate constitutional protections. Indeed, the Court explicitly stated that it was not deciding whether disclosure of the information by state officials would violate any constitutional guarantee. *Whalen*, 429 U.S. at 605-606, 97 S.Ct. at 879. To assure that there would be no misunderstanding on this point, Justice Stewart wrote separately to note that the Court's opinion did not support the proposition that dissemination of the information collected by New York would violate the Constitution. 429 U.S. at 607-609, 97 S.Ct. at 880-81.

Thus, there is no basis for Petitioners' apparent contention that *Whalen* constitutes controlling precedent with

respect to disclosures *by* governmental officials of personal information. This is not to say that *Whalen* has no precedential value. In fact, the Court of Appeals for the Sixth Circuit has repeatedly applied and followed *Whalen* in cases where the claimed violation of a constitutional right arose from a governmental *demand* for medical information. *See, e.g., Gutierrez v. Lynch*, 826 F.2d 1534 (6th Cir. 1987) (municipal ordinance requiring employees on sick leave for more than 30 days to complete medical information form); *In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983) (grand jury subpoena of psychotherapist records); *General Motors Corp. v. Director, National Institute of Occupational Safety and Health*, 636 F.2d 16 3(6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981) (N.I.O.S.H. request for employe medical records). *Whalen* cannot, however, be construed as establishing a constitutional right to prevent the disclosure of medical information by governmental officials, the right asserted by Petitioners in this case. (See Pet. App. at 75a, ¶ 75.)

The privacy interest actually acknowledged in *Whalen* bears little resemblance to the broad and ill-defined right asserted by Petitioners. The constitutional leap proposed by Petitioners—from an individual interest in avoiding governmental intrusion into personal matters to an implied affirmative obligation on the part of government to keep confidential the information it collects—simply does not stand up to scrutiny. Whatever interest Petitioners may have had under *Whalen* in avoiding disclosure of John Doe's HIV/AIDS status to the State—a right they do not allege was violated by Lockwood, the Board or any of the other respondents—that interest cannot be transmuted into a constitutional guarantee of confidentialiy wih respect to such information. No decision of this Court supports such an expansive reading of the Fourteenth Amendment. *See Paul v. Davis*, 424 U.S. 693, 713, 96

S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976) (asserted right to prevent publication of arrest was "far afield from privacy rights previously recognized by the Court).

CONCLUSION

For the reasons and the authorities cited herein, Respondents George Lockwood and Warren City Board of Health respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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